

STATE WATER CONTROL BOARD ENFORCEMENT ACTION

SPECIAL ORDER BY CONSENT

WITH

BAYMARK CONSTRUCTION CORPORATION

SECTION A: Purpose

This is a special order by consent issued under the authority of Sections 62.1-44.15(8a) and (8d) of the Code of Virginia between the State Water Control Board and Baymark Construction Corporation to resolve certain violations of environmental laws and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meanings assigned to them below:

1. ACode≡ means the Code of Virginia (1950), as amended.
2. ABoard≡ means the State Water Control Board, a permanent citizen's board of the Commonwealth of Virginia as described in Code §§ 62.1-44.7 and 10.1-1184.
3. ADEQ≡ means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Code § 10.1-1183.
4. ADirector≡ means the Director of the Department of Environmental Quality.
5. ARegional Office≡ means the Tidewater Regional Office of DEQ.
6. AOrder≡ means this document, also known as a consent special order.
7. APermit≡ means Virginia Water Protection (VWP) Permit No. 93-0149 which is the Commonwealth of Virginia's § 401 Water Quality Certification.
8. ARegulations≡ means 9 VAC 25-210-10 *et seq.* - Virginia Water Protection Permit Regulation.
9. "Baymark" means Baymark Construction Corporation, a Virginia corporation.

SECTION C: Findings of Facts and Conclusions of Law

1. The Permit was issued to Baymark on August 22, 2000 for the dredging of the Kings Creek marina basin and navigational channel of Kings Creek located in Cape Charles, Virginia. Kings Creek is a tributary to the Chesapeake Bay.
2. Sections 62.1-44.5 of the Code and 25-210-50 of the Regulations require that discharges to state waters or alteration of state waters be done in accordance with a permit issued by the Board. Section 62.1-44.15:5 of the Code requires that excavation in wetlands be performed in accordance with a Virginia Water Protection Permit.
3. Part I.F.1 of the Permit requires that DEQ be notified in writing 10 days in advance of the start of the dredging and 10 days after completion of the work. Part I.F.3 of the Permit specifies that the maximum depth of the dredging is -8.0 feet mean low water. Part I.F.18 of the Permit requires that a post dredge survey be submitted within 30 days of the completion of each dredging event.
4. Baymark finished the first phase of dredging in December 2001 and failed to notify DEQ within 10 days of the completion of dredging. Baymark also failed to submit the post-dredge survey within 30 days. It was received by DEQ on April 17, 2002. The post-dredge survey indicated that the maximum dredging depth was exceeded in the majority of the basin and channel by approximately one foot.
5. Baymark maintains that it exercised standard industry controls for depth, and did not compensate the dredging contractor for any dredging below the permitted depths.
6. Baymark completed the final phase of dredging in January, 2003 and submitted a post dredge survey. The final phase of dredging was conducted in accordance with the Regulations.
7. DEQ issued Notice of Violation W2002-06-T-005, to Baymark on June 28, 2002, advising of the above findings.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority of 62.1-44.15(8a) and (8d), orders and Baymark agrees that:

1. To remedy the violations described above and bring the facility into compliance, Baymark shall comply with the requirements in Appendix A of this Order.
2. Baymark shall pay a civil charge of \$5,000.00 payable within thirty days of the effective date of this Order. Payment shall be by check, certified check, money order, or cashier's check payable to the Treasurer of the Commonwealth of Virginia, Department of Environmental Quality. On the check, Baymark shall note that the payment is pursuant to this Order and include Baymark's Federal Identification Number. Payment shall be sent to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Baymark, for good cause shown by Baymark, or on its own motion after notice and opportunity to be heard.
2. Nothing herein shall be construed as altering, modifying, or amending any term or condition contained in any permit issued by the Board.
3. This Order addresses only those violations specifically identified herein. This Order shall not preclude the Board or Director from taking any action authorized by law, including, but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the site as may be authorized by law; and/or (3) taking subsequent action to enforce the terms of this Order. Nothing herein shall affect appropriate enforcement actions by other federal, state, or local regulatory authority, whether or not arising out of the same or similar facts.
4. For purposes of this Order and subsequent actions with respect to this Order, Baymark admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.
5. Baymark consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
6. Baymark declares it has received fair and due process under the Administrative Process Act, Code §§ 2.2-4000 *et seq.*, and the State Water Control Law, and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
7. Failure by Baymark to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
8. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
9. Baymark shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other act of God, war, strike, or such other occurrence. Baymark must show that such circumstances resulting in noncompliance were beyond its control and not due to a lack of good faith or diligence on its part. Baymark shall notify the Director or the Director of the Regional Office in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of this Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Director and the Director of the Regional Office within two business

days of learning of any condition listed above, which the Parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim of inability to comply with a requirement of this Order.

10. This Order is binding on the parties hereto, their successors in interest, designees, and assigns, jointly and severally.
11. This Order shall become effective upon execution by both the Director or his designee and Baymark. Notwithstanding the foregoing, Baymark agrees to be bound by any compliance date which precedes the effective date of this Order.
12. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Baymark. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Baymark from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

By its signature below, Baymark voluntarily agrees to the issuance of this Order.

And it is so Ordered this _____ day of _____, 2003.

Robert G. Burnley, Director
Department of Environmental Quality

Baymark voluntarily agrees to the issuance of this Order.

By: _____

Date: _____

Commonwealth of Virginia
City/County of _____

The foregoing document was signed and acknowledged before me this _ day of

_____, 2003, by _____, who is _____

of Baymark Construction Corporation on behalf of the Corporation.

Notary Public

My commission expires: _____.

APPENDIX A

BAYMARK

Baymark shall:

1. Notify the Tidewater Regional Office of DEQ (attention: Sheri Kattan) in writing no less than 10 days in advance of the start of each dredging cycle and within 10 days of the completion of each dredging event.
2. Arrange and attend a pre-dredging meeting prior to the commencement of dredging operations, to allow DEQ staff to inspect and approve the erosion and sediment control measures. If insufficient water is present in the Lake (settling basin) to allow deployment of the turbidity curtain prior to commencement of dredging, DEQ shall be notified and will determine at that time if the pre-dredge meeting will be necessary. If no pre-dredge meeting is held, the turbidity curtain shall be deployed prior to any discharge from the Lake (settling basin). DEQ shall be notified prior to or on the day of deployment of the curtain.
3. Ensure adequate capacity exists in the Lake (settling basin) prior to the start of dredging.
4. Maintain the turbidity curtain at the discharge point from the settling basin, as specified in the Permit, until dredging is completed and DEQ authorizes its removal.